

**BEFORE THE
PUBLIC SERVICE COMMISSION OF WISCONSIN**

Application of Wisconsin Energy Corporation for
Approval to Acquire the Outstanding Common Stock
of Integrys Energy Group, Inc.

Docket No. 9400-YO-100

**REPLY BRIEF OF
GREAT LAKES UTILITIES**

It is clear from the initial briefs that a threshold issue in this proceeding remains the appropriate reading of the “best interests” standard under Wis. Stat. § 196.795(3). The Applicant believes that the statutory language requiring that the proposed transaction be “in the best interests of utility consumers, shareholders, and the public” should be interpreted as a “do no harm” standard (WEC’s Initial Post-Hearing Brief at 4). Public Service Commission Staff (Staff) and intervenors, including Great Lakes Utilities (GLU), all believe the standard requires the applicant to show that the proposed transaction indeed will result in utility consumers and the public being “better off” than they were without the transaction; more precisely, that the transaction must provide actual, quantifiable and verifiable benefits to each of the three identified groups.¹ By the latter measure, for the many reasons discussed in Staff testimony and the initial briefs of the intervenor groups actively participating in this proceeding, the Applicant clearly falls short. By the former measure, whether the Applicant has met the standard is a closer call. But on the critical issue of how the proposed transaction potentially impacts the ongoing management and operation of the American Transmission Company (ATC), there is little doubt

¹ See e.g., Initial Post-Hearing Brief of the Wisconsin Industrial Energy Group and Wisconsin Paper Council (WIEG Initial Brief) at 10; Initial Brief of the Citizens Utility Board of Wisconsin (CUB Initial Brief) at 2p-4p; Direct-PSC-O’Donnell-15; Direct-GLU-Lowry-4r.

that even a “do no harm” standard should not insulate the Applicant from significant regulatory concern.

I. There is no Customer Benefit Derived from WEC’s Acquisition of a Controlling Interest in ATC.

Without conceding its position that the “best interests” standard does not require benefits to utility consumers and the public to be immediate, WEC goes on to highlight in its Initial Brief seven benefits it believes “will flow” to customers from the transaction: (1) a better financial profile to enhance capital investment in needed utility infrastructure; (2) economies of scale in areas such as energy efficiency, low income and conservation programs; (3) a larger, more diversified electric generation fleet; (4) an estimated 3-5% savings in non-fuel related O&M over the course of 5-10 years; (5) maintenance of each utility subsidiary’s commitment to community development and the regional economy; (6) the honoring of all union contracts; and (7) maintenance of historical ties to Wisconsin by keeping WEC’s corporate headquarters in Wisconsin (WEC’s Initial Post-Hearing Brief at 7). Items (1), (2) and (4) have by no means been demonstrated, as discussed by numerous Staff and intervenor witnesses (see e.g., CUB Initial Brief at 16p-17p; Direct-GLU-Lowry-12r-15r). Item (5) is not a benefit that stems from the transaction at all; items (6) and (7) are also not “benefits” -- they are commitments by the Company to maintain the status quo as a means of holding customers and the public harmless from what would otherwise be significant detriments caused by the transaction.

In contrast to the vague, general and unsupported benefits to utility consumers being touted by WEC, the benefits from the proposed transaction to utility shareholders, executives, lawyers and bankers are not only substantial, but readily quantifiable (CUB Initial Brief at 7p-8p; WIEG Initial Brief at 16). Chief among these quantifiable benefits is the share of income and potential cash flow that will accrue from WEC’s acquisition of Integrys’ 32% ownership interest

share in ATC (Direct-PSC-Hubert-24; Direct-GLU-Lowry-8; Rebuttal-GLU-Kothari-5). Notably, this aspect of the proposed transaction is not claimed by WEC to benefit utility consumers or the public in any way. Yet it is one of the aspects of the transaction that has been identified by numerous witnesses to hold the greatest potential risk for customers. Amplifying concerns raised by Commission Staff in filed testimony, GLU has discussed those risks at considerable length in its testimony and in its Initial Brief, and will not repeat that discussion here. Suffice it to say that the potential loss of regional diversity and independence in the governance of ATC are very real risks that warrant the Commission's rigorous attention and that make the additional conditions proposed by GLU to address those concerns worthy of serious consideration. Those additional conditions have been rejected by WEC on the grounds that they are "unnecessary" in view of the conditions it has already proposed in those areas (WEC's Initial Post-Hearing Brief at 16; 28-30). However, the additional conditions GLU has proposed, which have garnered support from Staff and from other intervenors, are necessary because there are no corresponding benefits to consumers or the public at all from WEC's potential influence over ATC, and the risks of such influence are simply too great.

II. GLU's Additional Conditions on ATC Voting and Governance are Necessary in order to Mitigate WEC's Potential Influence over ATC.

As discussed at length in GLU's Initial Brief, GLU acknowledges the merit of the voting limitation offered by WEC to allay concerns over its ability to influence ATC (GLU Initial Brief at 8). However, GLU has proposed a number of additional conditions that are necessary to further ensure that ATC continues to be operated in the best interest of all utility customers (and not just WEC's utility shareholders) in the event the proposed transaction is approved.² These

² GLU has also enumerated several other conditions, not addressed here, which have been apparently agreed to by WEC in the record, and which should be memorialized in the Commission's Order if it approves the transaction (GLU Initial Brief at 15-16).

conditions, some of which have also been proposed by Staff, range from divestment, to the establishment of a voting trust to be managed by ATC's municipal and cooperative owners, to the establishment of a Board seat for a representative of ATC's non-investor-owned, currently unrepresented owners, such as GLU. In its Initial Brief, WEC provides four reasons why its proposal to limit its voting interest in ATC to Integrys' 34% minority share, except for certain fundamental corporate matters, is sufficient, and why these additional ATC-related conditions are unnecessary. WEC's arguments here, however, miss the mark.

First, WEC argues that there is no vertical market power issue, and thus "the sole potential basis for these [additional] conditions does not exist." (WEC's Initial Post-Hearing Brief at 29) The fact is, the Federal Energy Regulatory Commission (FERC) has not yet determined whether a vertical market power issue exists. But even if FERC ultimately determines that the proposed transaction does not create vertical market power concerns, WEC's acquisition creates other potential concerns over the potential exercise of WEC's undue influence over ATC's management and operations. In other words, the potential exercise of vertical market power is not the sole basis for conditioning the transaction in such a manner as to restrict WEC's voting influence over ATC. If that were the case, WEC would not have been compelled to offer the voting restriction as part of its FERC filing, *prior* to the completion of FERC's vertical market power analysis.

Second, WEC argues that the Wisconsin law that gave rise to ATC's formation was never intended to preclude majority ownership of ATC (WEC's Initial Post-Hearing Brief at 29). As discussed in GLU's Initial Brief, this is not a settled matter.³ But even if WEC's characterization of legislative intent in ATC's formation is correct, that fact would really only have the effect of

³ GLU's Initial Brief at 6, citing the disagreement between Staff witness Pilo's testimony and WEC witness Leverett's testimony on this issue.

weakening the case for the Commission forcing WEC to divest its majority share of ATC. It would not diminish the need to impose the other alternative conditions that have been proposed by Commission Staff and by GLU, all of which are designed to mitigate WEC's potential influence over ATC's governance and ensure that ATC continues to meet the needs of all utility consumers and the public (as opposed to utility shareholders).

Third, WEC appears to believe that GLU's proposals to increase the voting power of non-investor-owned utilities and to grant a Board seat to an unrepresented, customer-oriented entity such as GLU, are prohibited by the statutes and are somehow contrary to the intent of the law creating ATC. That is simply not the case. Now that we are beyond the initial ten year start-up period of the company, the *only* requirement of Wis. Stat. § 196.485, ATC's formation statute, with respect to ATC's governance is that four seats on the Board must be occupied by independent (i.e. non-utility) owners, a requirement that reflects the Legislature's intent that the independent transmission company operate and maintain the transmission system for the benefit of all customers.⁴ As WEC's own witness Leverett acknowledges, no owner is "entitled" to a seat on ATC's Board, large or small, (Tr. Vol IV at page 58). WEC's argument that ATC Board representation must somehow be "proportional" to an entity's ownership interest is not only belied by the facts (MGE has a seat on the Board despite having less than a 4% ownership interest), but by ATC's own Bylaws, which, as witness Leverett recognizes, allow a group of ownership interests greater than 3% to seek Board nomination through the annual shareholder election process (Tr. Vol. IV at page 54).

⁴ See Wis. Stat. § 196.485(3m)(c)(2), which provides that ATC's operating agreement shall provide that "at least 4 managers or directors . . . have staggered 4-year terms, are elected by vote of the voting security holders and are not directors, employees or independent contractors of a person engaged in the production, sale marketing, transmission, or distribution of electricity or natural gas or an affiliate of such a person."

Perhaps more important, WEC's notion that it is somehow inappropriate for a small, transmission dependent municipal electric company such as GLU, whose sole purpose is to provide efficient, reliable and cost-effective electric service to its members and their customers, to seek a voice in managing Wisconsin's independent transmission company is at odds with WEC's claims throughout this proceeding that WEC values the "independent and collaborative" work ATC has done in planning the transmission system (see, e.g., Direct-WEC-Lauber-15). Indeed, it smacks of arrogance -- the implication being that ATC henceforth and forever after should only be managed by the large, generation-owning utilities that currently sit on the Board. It is precisely this mindset that gives rise to the concern for undue influence over ATC's management and operations by an entity that will now be by far the largest investor-owned utility in the State and that therefore justifies the mitigating voting and governance-related conditions GLU is proposing.

Fourth, WEC argues that its proposed voting conditions strike an appropriate balance between minimizing WEC's influence over ATC's "day-to-day" operations and protecting the company's economic interests in the acquisition (Initial Brief at 30). This argument is tautological -- WEC is merely stating that additional conditions are unnecessary because WEC's proposed voting limitation is "sufficient to resolve any lingering concerns." *Id.*

In short, WEC's arguments against the additional conditions GLU has proposed with respect to Board representation and voting are misdirected, and they ultimately ring hollow. The fact is, all parties in this proceeding, *including WEC*, agree that the Company's acquisition of a majority interest in ATC is potentially adverse to the interests of utility consumers and the public and therefore in need of some restriction. The only issue is whether or not WEC's proposed voting limitation is sufficient. GLU, Staff and others believe that additional measures should be

taken to limit WEC's influence over ATC, post-transaction, and increase the influence of more consumer-oriented, non-shareholder driven entities on ATC's management and operations.⁵

III. The Alternative Conditions Proposed by GLU Can Be Implemented without Fundamentally Altering the Existing Framework of ATC's Governing Structure.

In its Initial Brief, WEC also suggests that GLU's voting and Board-related conditions are "troubling," at least in part, because by empowering small ATC owners they would constitute a "fundamental change" in how ATC is governed (WEC's Initial Post-Hearing Brief at 30). Support for this argument is enlisted from Staff witness Hubert, who agrees that GLU appears to be seeking a "fundamental change" in its ATC-related proposals (Sur-surrebuttal-PSC-Hubert-6). The full context of Ms. Hubert's remark makes it clear that the "fundamental change" of which she speaks is increased representation "from the smaller non-generating, non-IOU owners," and that it is a change she supports because it will increase ATC Board diversity. (Id) Indeed, the measures GLU has proposed with respect to ATC's governance *are* intended to alter the way ATC is currently governed by giving a voice to ATC's smaller, transmission dependent utility owners. However, they do not require any modification of ATC's existing governance structure, and, in fact, may be implemented within the framework of the voting limitation that WEC has already proposed. In that sense, GLU's proposed conditions with respect to ATC's governance do *not* represent "fundamental" changes at all.

Specifically, the Commission could accept WEC's proposed voting limitation exactly as it has been presented by WEC, *with the added requirement that WEC throw its majority voting interest for ATC's open Board seat behind a representative of an existing, but currently*

⁵ Staff has proposed conditions to (i) restrict WEC's ownership of Preferred Stock or other classes of ATC voting securities; (ii) limit WEC and its affiliates to one ATC Board seat; (iii) extend WEC's governance limitations to successor purchasers of ATC; (iv) limit WEC's voting interest to 34% for all corporate matters; (v) require WEC to undertake and file a divestiture study within one year of the acquisition; (vi) restrict WEC's response to capital calls for a certain period of time, or otherwise divest its ATC interest so that it is not greater than 34%. GLU supports all of these proposals. CUB also suggests that ATC-governance related conditions, including filling a Board seat with an unrepresented owner, warrant serious consideration by the Commission (CUB Initial Brief at 26p).

unrepresented group of ATC's owners who meet the 3% voting threshold under ATC's Bylaws.

One such group of owners could potentially be GLU itself.⁶ Such a modification of the voting limitation WEC has voluntarily offered would add another geographically distinct and consumer-oriented voice to ATC's management and operations and would therefore allow the Commission to ensure that utility consumers and the public obtain an immediate benefit, post-transaction, to help offset the risks associated with WEC's potential exercise of influence over ATC.

Dated this 6th day of April, 2015.

Boardman & Clark LLP

By:

/s/ Richard A. Heinemann

Richard A. Heinemann,
Attorneys for Great Lakes Utilities
One South Pinckney Street, Fourth Floor
PO Box 927
Madison, WI 53701-0927
Phone: (608) 283-1706
Fax: (608) 283-1708

F:\DOCS\WD\25729\29\A2122955.DOCX

⁶ As pointed out in GLU's Initial Brief at 8, note 10, if WEC's proposed voting limitation is implemented, post-transaction, GLU's members currently holding ownership interests in ATC would have, in aggregate, more than a 3% voting interest.